

This is not just another „judicial reform“

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We are working on a new podcast series about the European constitutional conflict around and with Poland, and this is taking longer than planned due to the topic and our limited capacities. We won't be done before the week after next at the earliest, especially since hardly a day goes by without new aspects and facets being added – most recently, of course, the news from Luxembourg that Poland will have to pay one million euros for every day it continues to ignore the previous orders of the ECJ (more on this in a moment).

What strikes me about the debate in Germany is the willingness with which many engage in what is called in dialectics an *argumentum ad temperantiam* or „[fallacy of the golden mean](#)„: the tendency to map conflicts on a continuous scale and place the conflicting parties on opposite far-out ends, one extreme to the left, one extreme to the right, so the solution to the conflict seems to pretty much follow all by itself: it's in the middle, of course.

Oh, they say, if only this PiS government weren't so extreme! We are all so reasonable, moderate and balanced, we respect Poland's sovereignty and self-determination and would have no problem whatsoever with those „judicial reforms“ if those PiS people didn't always carry everything to the extreme! If they weren't so ruthless about it! So not at all willing to compromise!

On the other hand, they like to go on, the ECJ is quite extreme in a way, too. Always pushing the envelope to extend their competence, aren't they? Who gave them the right to oversee the judicial policy of the member states in the first place? Didn't the Polish Constitutional Tribunal actually even have a point when it defied this encroachment from Luxembourg in its 7 October ruling, which, unfortunately, was of course also way too extreme?

This way of describing the conflict makes certain things invisible, and, I would argue, not by mistake.

The first thing that becomes invisible is what actually happened: The PiS government is working on the project of a subservient judiciary. [If that is so](#), then *this* is the problem and not how extreme or moderate the means are by which they pursue that aim. [If that is so](#), then calling this project a „judicial reform“, let alone calling the EU protest against it an attempt to „[force Warsaw to change its judicial system](#)„, is a very peculiar choice of words indeed and very much in need of justification. Which disappears immediately from sight, however, if you take the position of the golden mean.

The fallacy of the golden mean is not only a dialectical trick to secure points in an argument to which one is not entitled. It is also a means of self-empowerment. By using it you determine where the middle is and where the extremes are. One extreme on the left, one extreme on the right, and the middle is where we stand. Which thus becomes a neutral, balanced, uncontroversial standpoint. The standpoint in the middle is in no need of justification, because and as long as it stays equidistant from the extremes.

This standpoint in the middle requires not just one supposed extreme, but two. The ECJ, which did not volunteer for the Herculean job of taming PiS, seems to be just right for this role, with its history of stealthily extending the EU's competences, in „[collusive cooperation](#)“ with the Commission, of course, which may be seen at work also in the process of applying for, setting and enforcing penalty payments against disobedient member states. One million euros a day! Those extremists!

It was the governments of the member states that let it come to this, first and foremost (*ceterum censeo*) our very own German government. They have eviscerated the supranational and shirked the intergovernmental defence of the rule of law in the Union. Their place is not the golden mean. Their place – and therefore all of ours – is right there in the middle of the fray.

The Week on Verfassungsblog

If you happen to live in South Baden, here is something for you: Next week, we will be performing the „[Volkskanzler](#)“ play there on three evenings, including a small pre-performance lecture on COVID, artistic freedom and the state of emergency by me and a discussion with the audience afterwards. On Monday we will play in **Freiburg** in the Humboldt-Saal, on Tuesday in the Maja in **Emmendingen** and on Wednesday in the *Kulturzentrum am Münster* in **Constance**. I would be VERY happy to see you there!

[LAURA WINNINGER](#) analyses the ECJ's decision on the **penalty payment** against Poland and concludes that it will strengthen the EU's credibility: „Instead of becoming embroiled in political discussions, the Commission was able to act in a solution-oriented manner in the matter and thus, together with the ECJ, effectively and credibly defend the fundamental principles of the European legal community for the first time in the conflict that has already lasted more than five years.“

Two titans of Polish constitutional law, [EWA #ETOWSKA](#) and [STANIS#AW BIERNAT](#), have added a detailed commentary to the statement by 27 former constitutional judges (including themselves), explaining why the „verdict“ of the so-called **Polish Constitutional Tribunal** of 7 October mocks any serious analysis, even from the perspective of Polish national law.

The other crisis of the rule of law in Poland is taking place on the **EU's external border with Belarus**. [DANA SCHMALZ](#) objects to the war rhetoric of the „weaponisation“ of refugees and shows that what is meant by this is a „phenomenon generated by action and discourse in concert“. „The actual actions of letting people

enter or bringing them to the border become significant only in combination with an accompanying discourse that declares these people to be a consciously controlled danger or burden.“ [GRA#YNA BARANOWSKA](#) describes the two parallel legal frameworks that Poland has established to legalise pushbacks.

In the **Netherlands**, the government, out of fear of being rooked on child support, has harassed thousands of families in the most horrible way for years, without the victims being able to find protection anywhere, especially not in the courts. This has to do with the fact that in the Netherlands the constitution itself explicitly forbids declaring statutory law unconstitutional. The Venice Commission of the Council of Europe recently wrote an expert opinion on this with a number of recommendations, including one to think about amending the constitution. [INGRID LEIJTEN](#) considers this to be practically difficult, but nevertheless believes that the time is ripe for such a discussion.

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All best,
the Verfassungsblog team

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After the *Bundestag* elections in **Germany**, the future „traffic light coalition“ is negotiating a coalition agreement. The CDU/CSU is not part of it, but it can exercise a veto position via the *Bundesrat*. [CHRISTIAN STECKER](#) thinks this is a problem of democracy and suggests reforming the voting system in the *Länder* chamber.

In **India**, there are 750 million internet users, but nowhere are internet shutdowns more frequent – despite a revolutionary Supreme Court decision in 2020 establishing a right to internet access. [TANMAY SINGH, ANANDITA MISHRA and KRISHNESH BAPAT](#) investigate why that is.

In **Colombia**, the government has abandoned its opposition to the „Special Tribunal for Peace“ that its predecessors had agreed with the civil war opponent FARC. In return, the chief investigator of the International Criminal Court wants to stop the preliminary investigations in Colombia for the time being. [KAI AMBOS](#) sees this as a sign that the chief investigator wants to engage states that are willing to cooperate more.

So much for this week. All the best to you, stay safe and healthy, please support us on [Steady](#) and/or [Paypal](#), and see you next week!

